MULTI-PURPOSE BANK BHD A

v.

UNIPHOENIX CORPORATION BHD

HIGH COURT MALAYA, KUALA LUMPUR B
ABDUL MALIK ISHAK J
[COMPANIES (WINDING-UP) NO: D4-28-161-1998]
8 MAY 2006

COMPANY LAW: *Winding up - Petition - Striking out - Application to strike out petition - Whether winding up proceedings constitute abuse of court's process - Serious disputes - Whether raised in relation to petitioner's claim - Whether alleged debt bona fide disputed on substantive grounds - Whether winding up petition must fail* C

COMPANY LAW: *Winding up - Petition - Striking out - Application for - Petitioner's purported letter of demand and s. 218 notice - Whether premature - Whether invalid and improper - Whether there was serious dispute to purported liability of respondent - Absence of proper and valid demand - Whether petitioner's claim against respondent null and void - Whether petitioner estopped from proceeding with winding up proceedings* D E

CONTRACT: *Guarantee - Corporate guarantee - 'On demand' guarantee - Whether there must be valid and proper demand made before guarantor held liable - Whether there was admission of liability - Failure of proper demand made - Whether cause of action exists against guarantor - Breach - Varying scheme of interest - Charge of additional interest - Whether petitioner in breach of contract - Whether petitioner's conduct against public policy* F

CIVIL PROCEDURE: *Striking out - Winding up petition - Rules of the High Court 1980, O. 18 r. 19 - Whether applicable - Whether court has inherent jurisdiction - Rules of the High Court 1980, O. 1 r. 2(2), O. 1 r. 2(3) and O. 18 r. 19(3)* G

This was the respondent's application to strike out the petitioner's winding up petition in encl. 5. The petitioner had commenced this winding up proceedings against the respondent without the benefit of any judgment. The facts were that the petitioner claimed against the respondent as a guarantor of banking facilities taken by Halim Securities Sdn Bhd ('the borrower') pursuant to a corporate guarantee. It was an 'on demand' guarantee. Pursuant to the purported letter of demand dated 26 January 1998 and the H I

A s. 218 notice dated 17 February 1998, the petitioner had demanded for the following sums: (1) overdraft of RM667,649.26 as at 14 January 1998 plus interest at the rate of 4% above the base lending rate ('BLR'); and (b) term loan of RM15,291,691.71 as at 14 January 1998 plus interest at the rate of 4% above the B costs of fund ('COF') and further interest at the rate of 1% above the COF. Pursuant to the letter of offer to the borrower dated 8 April 1997, the interest rate for both the overdraft and the term loan facilities was fixed at 3% plus BLR. The petitioner had *vide* a letter dated 5 September 1997 purportedly varied the interest rate C from 3% plus BLR to 4% plus BLR for both the term loan and the overdraft facilities. Thereafter, the petitioner had *vide* another letter dated 31 December 1997 purportedly varied the interest rate for the term loan facility from 4% plus BLR to 4% plus COF. The issues that arose were (a) whether the winding up D proceedings herein constituted an abuse of process and ought to be struck off; (b) whether there were serious disputes raised by the respondent in relation to the whole of the petitioner's claim and (c) whether the alleged debt was *bona fide* disputed on substantive grounds.

E

Held (striking out petition and granting order in terms of encl.5 with costs):

(1) It was wrong on the part of the petitioner to say that 'the respondent (or the borrower) made two payments to reduce F the indebtedness.' It was the borrower and not the respondent who had made payments to the petitioner on 26 February 1998 and 6 March 1998. The stand of the respondent was that no payments have been made by the respondent as a guarantor and there was no admission of G liability by the respondent at all material times. Where the guarantee is an 'on demand' guarantee, there must be a valid and proper demand made before the guarantor could be held liable. Without a proper demand being made, there could be no cause of action against the guarantor irrespective of the H purported indebtedness and liability of the borrower. (para 4)

(2) The petitioner had filed two separate winding up petitions simultaneously against the borrower and the respondent. Both the said winding up petitions were identical in nature. And I although it was the borrower who had made payments and alleged by the petitioner to have 'admitted' the debt, the petitioner saw it fit to withdraw the petition against the

borrower. Instead, the petitioner chose to proceed against the respondent unilaterally. All these constituted *bona fide* issues that would not be suitable determination by way of a winding up petition. As long as there was a *bona fide* dispute to the petitioner's claim, the winding up petition must fail and the said petition would constitute an abuse of the process of the court. (paras 5 & 13)

(3) The petitioner was in breach of the contract by purportedly varying the scheme of interest from BLR to COF and purportedly charging an additional 3.9 interest. The terms of the letter of the offer dated 8 April 1997 stated that the 'interest rates' could be subjected to changes and did not state that the very basis for the calculation of interest could be varied. Thus, it was wrong for the petitioner to demand for payment of something which the petitioner had no right to it. (para 15)

(4) The petitioner's purported recall of all the facilities was based on the letter dated 16 September 1997 issued by the petitioner to the borrower which purportedly reduced the overdraft facility and insisted that all the RM5 million must be fully repaid in three months. This was certainly in breach of the letter of offer which merely allowed for repayment on demand. It did not provide for a reduction of the facilities of overdraft by stages which was not only in breach of the contract but was actually unfair and oppressive bearing in mind that the term loan was only repayable in one lump sum on 8 April 1998. Such conduct by the petitioner was certainly against public policy. (para 17)

(5) Both the purported letter of demand and s. 218 notice were not only premature but it was also an improper and an invalid demand being excessive in nature. The petitioner was demanding from the respondent as the guarantor for the payment of the sum of RM15,000,000 with the purported interest even before there was a default by the borrower and before such sums were due from the borrower. There was thus a serious dispute to the purported liability of the respondent pursuant to the corporate guarantee. In the absence of a proper and valid demand the petitioner's whole claim against the respondent as a guarantor would be invalid,

null and void. The petitioner's claim was in breach of the letter of offer and premature, consequently, it must be held that the petitioner had no right to make any demand against the respondent as a guarantor. Furthermore, the petitioner was also estopped from proceeding with the winding up proceedings because the letter of offer contemplated legal proceedings to recover any monies due and not by way of winding up proceedings. (paras 18 & 19)

(6) In arguing that O. 1 r. 2(2) of the Rules of the High Court 1980 applied to exclude O. 18 r. 19 of the RHC, the petitioner failed to take into account the following factors: (1) that the Companies (Winding-Up) Rules 1972 do not state that the provisions of the RHC are not applicable; (2) that O. 18 r. 19(3) of the RHC states that the rule shall apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading and (3) the provision of O. 1 r. 2(3) of the RHC. (para 23)

(7) Order 18 r. 19 of the RHC was applicable to a winding up petition commenced pursuant to s. 218 of the Companies Act 1965 save that damages could not be awarded pursuant to the said O. 18 r. 19 RHC. The court has the inherent jurisdiction to strike out the winding up petition. In *Tan Kim Hor v. Tan Heng Chew & Ors* the Court of Appeal had considered *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* and *Buildcon – Cimaco Concrete Sdn Bhd v. Filotek Trading Sdn Bhd* and held that it did not mean that O. 18 r. 19 RHC was totally inapplicable and that there may be instances where a winding up petition ought to be struck out pursuant to O. 18 r. 19 of the RHC. (paras 21, 22 & 24)

Case(s) referred to:

Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 2 MLJ 423 ***(refd)***

Arab-Malaysian Bank Bhd v. Lian Yit Engineering Sdn Bhd [2000] 1 CLJ 572 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Trading Sdn Bhd [1999] 4 CLJ 135 HC ***(refd)***

Bukit Melita Sdn Bhd v. Lam Geok Hee & Ors [1996] 1 LNS 479 ***(refd)***

Chong Chee Yan v. Golden Dragon Garden Sdn Bhd [1999] 3 CLJ 151 HC ***(refd)***

Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 HC ***(refd)***

Credit Corp (M) Bhd v. Lucky Height Development Sdn Bhd & Ors [1996] 4 MLJ 556 ***(refd)***

Dato' Ibrahim Hj Ismail & Anor v. Onstream Marine Sdn Bhd & Ors [1998] 4 MLJ 86 ***(refd)***

Dato' Mohamed Hashim Shamsuddin v. Attorney-General, Hongkong [1986] 2 MLJ 112 ***(refd)***

Development & Commercial Bank Bhd v. Cheah Theam Swee [1989] 2 MLJ 496 ***(refd)***

Ellis v. Allen [1914] 1 Ch D 904 ***(refd)***

Eushun Properties Sdn Bhd & Ors v. MBF Finance Bhd [1992] 3 CLJ 1519; [1992] 1 CLJ (Rep) 104 SC ***(refd)***

Gentali (Malaysia) Sdn Bhd v. Kawasaki Sunrock Sdn Bhd [1996] 4 CLJ 813 HC ***(refd)***

Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd [1988] 1 CLJ 649; [1988] 1 CLJ (Rep) 618 HC ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451 HC ***(refd)***

Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 MLJ 610 SC ***(refd)***

NKM Development Sdn Bhd v. Irex Sdn Bhd [1988] 1 CLJ 65; [1988] 2 CLJ (Rep) 54 HC ***(refd)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank Berhad [1989] 3 MLJ 155 SC ***(refd)***

Oriental Bank Bhd v. Jaafar Sidek Mohd Salam & Ors [1990] 2 CLJ 72; [1990] 2 CLJ (Rep) 585 HC ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 MLJ 143 ***(refd)***

Perwira Affin Bank Berhad v. Orison Sdn Bhd & 2 Ors [2004] 5 CLJ 256 HC ***(refd)***

Perwira Habib Bank Malaysia Berhad v. Hj Abdullah Hj Sulaiman & Anor [1985] 2 CLJ 489; [1985] CLJ (Rep) 639 HC ***(refd)***

Prismanet (M) Sdn Bhd (formerly known as Syarikat Telefon Wireless (M) Sdn Bhd) & Anor v. Perwira Affin Merchant Bank Berhad (formerly known as Permata Merchant Bank Berhad) & 3 Ors [1998] 4 AMR 3588 ***(refd)***

Public Bank Berhad v. Berjaya Housing Development Sdn Bhd & Ors [1995] 1 CLJ 237 HC ***(refd)***

Re Lo Siong Fong [1994] 2 MLJ 72 ***(refd)***

Re Nima Travel Sdn Bhd Sun Soon Heng Coach Works Sdn Bhd v. Nima Travel Sdn Bhd [1986] 2 MLJ 374 ***(refd)***

Si & Si Sdn Bhd v. Hazrabina Sdn Bhd [1996] 2 MLJ 509 ***(refd)***

Standard Chartered Bank Ltd v. Walker & Anor [1982] 3 All ER 938 ***(refd)***
Teo Kim Huatt v. AETNA Universal Insurance Bhd (No 1) [2002] 2 CLJ 147 HC ***(refd)***
The Pacific Bank Bhd v. Chan Chin Aun & Ors [1993] 1 CLJ 242 HC ***(refd)***
Wee Wood Industries Sdn Bhd v. Guannex Leasing Sdn Bhd [1990] 2 CLJ 1060; [1990] 3 CLJ (Rep) 355 HC ***(refd)***
Yamamori (Hong Kong) Ltd v. Davidson & Ors [1992] 2 MLJ 410 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218
Contracts Act 1950, ss. 75, 79
Rules of the High Court 1980, O. 1 r. 2(2), (3), O. 18 r. 19(3), O. 27 r. 3

For the petitioner - G Vijay Kumar; M/s Lee Hishamuddin
For the respondent - Jayne Koe (Justin Voon Tiam Yu & Edward Kok with him); M/s Cheah Teh & Su

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

Introduction

[1] This was the respondent's application to strike out the petitioner's winding-up petition in encl. 5. The petitioner commenced this winding-up proceedings against the respondent without the benefit of any judgment. And as long as there exists a *bona fide* dispute as to the petitioner's claim, the winding-up petition must fail and the said petition must be construed as an abuse of the process of the court.

Facts

[2] The petitioner claimed against the respondent as a guarantor of banking facilities taken by Halim Securities Sdn Bhd (hereinafter referred to as the "borrower") pursuant to a corporate guarantee dated 26 September 1994. It was an "on demand" guarantee and this meant that there must be a valid and proper demand before the liability of the guarantor can be established *(Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad* [1989] 3 MLJ 155, SC; and *Mok Hin Wah &*

Ors. v. United Malayan Banking Corp. Bhd. [1987] 2 MLJ 610, SC). Now, pursuant to the purported letter of demand dated 26 January 1998 and the s. 218 notice dated 17 February 1998, the petitioner had demanded for the following sums:

(a) overdraft of RM667,649.26 as at 14 January 1998 plus interest at the rate of 4% above the base lending rate ("BLR"); and

(b) term loan of RM15,291,691.71 as at 14 January 1998 plus interest at the rate of 4% above the costs of fund ("COF") and further interest at the rate of 1% above the COF.

Pursuant to the letter of offer to the borrower dated 8 April 1997, the interest rate for both the overdraft and the term loan facilities was fixed at "3% plus BLR" and it was further provided that:

> All terms and conditions including interest rates, fees and commissions stipulated herein and current and are subject to changes from time to time at the absolute discretion without prior notice to give.

So, the petitioner had *vide* a letter dated 5 September 1997 purportedly varied the interest rate from "3% plus BLR" to "4% plus BLR" for both the term loan and the overdraft facilities. Thereafter, the petitioner had *vide* another letter dated 31 December 1997 purportedly varied the interest rate for the term loan facility from "4% plus BLR" to "4% plus COF" effective from 1 January 1998.

[3] I struck out the petition and granted an order in terms of encl. 5 with costs.

Decision Of The Court

[4] It was wrong on the part of the petitioner to say that "the respondent (or the borrower) made two payments to reduce the indebtedness". In fact, it was the borrower and not the respondent who made payments to the petitioner on 26 February 1998 and 6 March 1998. The stand of the respondent was this. That no payments have been made by the respondent as a guarantor and there was no admission of liability by the respondent at all material times. The petitioner seemed to suggest that because the borrower is indebted to the petitioner, then it

followed that the respondent too is similarly indebted to the petitioner. With respect, this was wholly untenable and without any basis in law and in fact. It is trite law that where the guarantee is an "on demand" guarantee, just like this case, there must be a valid and proper demand made before the guarantor can be held to be liable. Without a proper demand being made, there can be no cause of action against the guarantor irrespective of the purported indebtedness and liability of the borrower.

[5] It would be interesting to point out that the petitioner had in fact filed two separate winding-up petitions simultaneously against the borrower and the respondent. The winding-up petition against the borrower was dated 17 March 1998 and presented to the Kuala Lumpur High Court on 19 March 1998 *vide* Kuala Lumpur Companies (Winding-Up) no: D5-28-162-1998. The winding-up petition against the respondent was also dated 17 March 1998 and presented to this court on 19 March 1998. Both the winding-up petitions against the borrower and the respondent were identical in nature. The sums demanded and the dates of filing and presentation of the petitions were the same. However, despite the petitioner's allegation that the borrower is indebted to the petitioner, yet the petitioner had on 18 July 2000 withdrawn the winding-up petition against the borrower. And although it was the borrower who had made payments and alleged by the petitioner to have "admitted" the debt, yet the petitioner saw it fit to withdraw the petition against the borrower. Instead, the petitioner now chose to proceed against the respondent unilaterally. All these constituted *bona fide* issues that would not be suitable for determination by way of a winding-up petition.

[6] The petitioner relied heavily on the letter dated 9 March 1998 found in exh. "KS14" of encl. 14 to support its argument that the respondent had admitted the debt. With respect, the following factors must be taken into consideration:

(1) that the letter dated 9 March 1998 was clearly written on behalf of the whole group of companies and not from the point of view of the respondent as the guarantor;

(2) that this letter was consistent with the fact that both the part payments of RM200,000 made on 4 March 1998 and 9 March 1998 respectively were made by the borrower and not by the respondent;

(3) that there was no clear and unequivocal admission in order to qualify as an admission to legal liability in law; and

(4) the letter, in any event, cannot be construed as an admission in the light of the valid defences of the respondent to the petitioner's claim.

In *Development & Commercial Bank Bhd v. Cheah Theam Swee* [1989] 2 MLJ 496, the court held that writing about repayment was not an admission of liability. In *Perwira Habib Bank Malaysia Berhad v. Haji Abdullah bin Haji Sulaiman & Anor* [1985] 2 CLJ 489; [1985] CLJ (Rep) 639, the court held that there was no unequivocal admission and the words "I will pay" did not necessarily imply to mean "as I am legally obliged to do". Furthermore, in the context of the present case, the purported "admission" was not pleaded nor set out in the winding-up petition as a ground relied upon by the petitioner to wind-up the respondent. And the case of *Ellis v. Allen* [1914] 1 Ch. D 904 relied upon by the petitioner can readily be distinguished. That case concerned Order XXX11, r. 6 of the English rules then in force which is equivalent to our O. 27 r. 3 of the Rules of the High Court 1980 ("RHC") in relation to judgment on admissions. Here, there was no issue of "withdrawal" of admission as alleged by the petitioner because there was no admission by the respondent which would entitle the petitioner to a winding-up order against the respondent particularly in the light of the various *bona fide* disputes to the debt raised by the respondent based on substantial grounds.

[7] Two things must be highlighted:

(1) no judgment was secured against the respondent by the petitioner; and

(2) the alleged debt was *bona fide* disputed by the respondent.

And these two things were nothing new. They have been considered by other judges before me.

[8] In *Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd* [1988] 1 CLJ 649; [1988] 1 CLJ (Rep) 618, Zakaria Yatim J (as he then was) said:

A It is common ground that there is no judgment debt in the present case. The question for the court to consider is whether the petitioner is a creditor and the respondent company is a debtor. A creditor is a person who could enforce his claim against the company by an action of debt and a person cannot petition as a B creditor when he merely has a right of action against the company for unliquidated damages for breach of contract (see *Pennington's Company Law* (1985) 5th Ed p 843). Where a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a creditor (see *Re Lympne Investment Ltd* [1972] 2 All ER 385 at page 389). If the petitioner is not a creditor, it is not C entitled to present a petition or apply for a winding-up order. It has no *locus standi* and the petition must fail (see *Munn & Another v. Goldstein & Another* [1968] 2 All ER 769 at p 771).

[9] In *NKM Development Sdn. Bhd. v. Irex Sdn. Bhd.* [1988] 1 CLJ 65; [1988] 2 CLJ (Rep) 56, VC George J (as he then was) D said:

12. I was more than satisfied that the alleged debt on which the petition was founded was disputed and on substantial grounds. I was of the opinion that the petition must fail for the same reasons E that Megarry J gave for coming to a similar conclusion in the case of *Re Lympne Investments Ltd.* [1972] 2 All ER 385 where he said on page 388 line i,

> It therefore seems to me that this petition must fail. A real dispute, turning to a substantial extent on disputed F questions of fact which require *viva voce* evidence, and involving charges of fraud or near fraud, cannot properly be decided on petition. Nor is it right, or in accordance with the modern practice, to stand over the petition in order that the disputed issues may be resolved in other proceedings. G That practice I may say seems to stem from *Re London & Paris Banking Corpn*. The Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding-up petition against it are such that it would be wrong to allow H the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out. Further, *Mann v. Goldstein,* cited with approval in the New Zealand I Court of Appeal in *Bateman Television Ltd. v. Coleridge Finance Co. Ltd.*, provides authority for saying that when a

petition is based on a debt which is disputed on substantial grounds, the petitioner is not a 'creditor' within s. 224(1) of the Companies Act 1948 who has the *locus standi* requisite for the presentation of the petition, even if the company is in fact insolvent. Again, the existence of a dispute on substantial grounds as to the existence of any debt defeats the contention that Lympne has, within the meaning of s. 223(a), 'neglected' to pay the sum required by the statutory notice: see *Re London & Paris Banking Corpn*. In the context of a notice requiring a person to do some act, I do not see how it can be said that the person 'neglects' to do that act if the reason for not doing it is a genuine and strenuous contention, based on substantial grounds, that the person is not liable to do the act at all. If there is liability, a failure to discharge that liability may well be 'neglect' whether it is due to inadvertence or obstinacy or dilatoriness; but a challenge to liability is a challenge to the foundation on which any contention of 'neglect' in relation to an obligation must rest. All these considerations point in the same direction, and accordingly I dismiss the petition.

13. The petition was struck off and dismissed with costs.

[10] In *Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd* [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451, Abu Mansor J (as he then was) succinctly said:

I lean in favour of *Re Lympne Investments Ltd* [1972] 2 All ER 385 at p 389 which decided that when a debt was disputed on substantial ground, the petitioner was not a 'creditor' clothed with *locus standi* to present a petition even if the company was insolvent (emphasis is mine). Consistent with the principle in that case, *Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn. Bhd* [1988] 3 MLJ 49 was also decided echoing that decision.

[11] In *Re Nima Travel Sdn. Bhd. Sun Soon Heng Coach Works Sdn. Bhd. v. Nima Travel Sdn. Bhd.* [1986] 2 MLJ 374, at p. 375 to p. 376 of the report, Shankar J, in style, had this to say:

There is a plethora of authorities to the effect that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the company (see *Buckley, supra* at page 451 (a)).

> On the facts before me I am satisfied that there is a *bona fide* dispute as to whether there is a debt due from the respondent to the petitioner and also the quantum of such debt. The proper course of action for the plaintiff the moment they knew that their claim was disputed, was to establish their debt by filing an action to have the matter adjudicated upon in the usual way. If they were so convinced of the strength of their case, they could have applied for summary judgment. These steps could have been taken in February or March 1984 and by now the position may well have crystallised.

[12] In *Chong Chee Yan v. Golden Dragon Garden Sdn Bhd* [1999] 3 CLJ 151, Clement Skinner JC (now judge) said at p. 163 of the report:

> As far as the law is concerned, it has been held that where a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a creditor. If the petitioner is not a creditor, he is not entitled to present a petition or apply for a winding-up order. He has no *locus standi* and the petition must fail (see *Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49). Similarly, a petition for winding-up cannot be resorted to secure a disputed debt. The proper course for the petitioner is to to file a civil suit for determining the disputed claims (see *Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58).

[13] In all these cases, no judgments were first obtained by the petitioners there. In my judgment, as long as there exists a *bona fide* dispute to the petitioner's claim, the winding-up petition must fail and, in law, the said petition would constitute an abuse of the process of the court.

[14] It is a very stringent requirement that a proper demand ought to be made. In *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yit Bank Berhad (supra)*, the Supreme Court held that the carbon copies of the demand sent to the guarantors including the appellant there must be construed to be an invalid demand. What constitutes a proper and a valid demand? To constitute a proper and a valid demand, the demand must stipulate the proper sum and it must not be an excessive demand. An excessive demand is not a valid demand to enforce an on demand guarantee. The High Court in *Credit Corp (M) Bhd v. Lucky Height Development Sdn Bhd & Ors* [1996] 4 MLJ 556 held that a wrongful demand for an additional 2% interest will only

make the demand bad and raised a triable issue disentitling the plaintiff to summary judgment against the guarantor. It must also be borne in mind that where the demand made is in respect of a sum which the petitioner is not entitled to or has no right to it, then it would be construed as an invalid and ineffective demand (*Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467).

[15] In regard to the rate of interest, it cannot be denied from the available evidence that the COF's interest was much higher than the BLR. For instance, in January 1998 the petitioner's BLR was less than 11% whereas the petitioner's COF was computed at 14.35%. In *Arab-Malaysian Bank Bhd v. Lian Yit Engineering Sdn Bhd* [2000] 1 CLJ 572, the learned judge held that (see p. 578 of the report):

> Whilst I agree that the plaintiff has the absolute discretion to vary the rate of interest, such discretion is only limited to varying the rates of the interest as provided under the prescribed rate of the existing facility agreements which is the scheme of interest based on the BLR. The plaintiff had no right to vary the scheme of interest as a whole from BLR to cost of funds because both the schemes of interest are two distinct forms of interest which are calculated on different formulae.

Likewise here, as demonstrated, the schemes of interest for BLR and COF were entirely different. The petitioner was clearly in breach of the contract by purportedly varying the scheme of interest from BLR to COF and purportedly charging an additional 3.9% interest. The terms of the letter of offer dated 8 April 1997 stated that the "interest rates" can be subject to changes and did not state that the very basis for the calculation of interest can be varied. Thus, it was wrong for the petitioner to demand for payment of something which the petitioner had no right to it. In *Credit Corp (M) Bhd v. Lucky Height Development Sdn Bhd & Ors (supra)*, the court found that the penalty interest rate of only 2% to be excessive and was sufficient to raise a defence for trial. At any rate, the lack of a proper demand against the respondent as guarantor based on an on demand guarantee constituted a complete defence to the petitioner's claim. In para. 7 of the winding-up petition, the petitioner claimed that the respondent was indebted to the petitioner in the sum of RM16,075,797.97 as at 12 March 2001 and a copy of the statement of account was

annexed as exh. "A3". Again, this was repeated in para. 4 of the affidavit of Wong Kon Fook that was affirmed on 22 May 1998 and exh. "WKF5" annexed thereto showed the purported certificate of indebtedness. From the purported statement of account and the purported certificate of indebtedness, the sum of RM16,075,797.97 included the unlawful interest based on the "4% plus COF" and also the purported "late charges" for the term loan facility which was not reflected anywhere in the letter of offer. From these brief narration of the facts, it was clear that the petition was defective because it demanded for improper sums pursuant to the guarantee. In my judgment, the petitioner was not entitled to rely on the "conclusive evidence" statement because the respondent has succeeded in showing that there was a "manifest error" in the said statement and that there were good reasons to doubt the accuracy of the said statement. In *Oriental Bank Bhd. v. Jaafar Sidek b. Mohd Salam & 2 Ors* [1990] 2 CLJ 72; [1990] 2 CLJ (Rep) 585, Siti Norma Yaakob J (now Chief Judge of Malaya) aptly said:

> Then again there is the imposition of the interest rate of 13.75% per annum at monthly rests. Under Clause 1 of the guarantee, the defendants had agreed to pay interest at the rate or rates from the time being agreed between the 1st defendant and the plaintiff. It is not disputed that such rate was agreed at 3.75% per annum above the plaintiff's base lending rate. There is documentary evidence to show that the plaintiff's base lending rate had been reduced to 7% per annum in which case the plaintiff is only entitled to charge interest at 10.75% and not 13.75% as it now claimed.
>
> In the light of such apparent likelihood of the 1st defendant's account being incorrect, the application cannot be intended to have the effect of circumventing clause 19 of the guarantee. For the clause to operate against the defendants, the plaintiff must first establish that any certificate it issues on the 1st defendant's indebtedness can be accepted as correct and I consider that this is a condition precedent which must be fulfilled by the plaintiff. In this case, the defendants have given me good reasons to question the accuracy of the plaintiff's certificate issued under clause 19, and under such circumstances I consider that the certificate can no longer be regarded as being conclusive as evidence against the defendants in these proceedings.

[16] Be that as it may, it was part and parcel of my judgment that the petitioner should not be allowed to rely on the conclusive evidence clause in order to make an unlawful demand against the respondent as the guarantor *(Credit Corp (M) Bhd v. Lucky Height Development Sdn Bhd & Ors (supra))*. At any rate, the petitioner's claim also included a claim for "penalty interest" and the petitioner was certainly not entitled to the "penalty interest" under s. 75 of the Contracts Act 1950 (Act 136) unless the petitioner has proven that it had suffered the said damages, and there was no such proof to that effect (*Wee Wood Industries Sdn Bhd. v. Guannex Leasing Sdn. Bhd.* [1990] 2 CLJ 1060; [1990] 3 CLJ (Rep) 355).

[17] Quite apart from the issues of excessive and invalid demand, there was also the issue of the substantial dispute with regard to the petitioner's right to recall the facilities. It must be highlighted that the respondent's obligations pursuant to the guarantee were subject to the borrower's liability and the respondent was entitled to all the defences available to the borrower (*The Pacific Bank Bhd. v.Chan Chin Aun & 2 Ors.* [1993] 1 CLJ 242; and *Standard Chartered Bank Ltd v Walker and Another* [1982] 3 All ER 938, CA). Section 79 of the Contracts Act 1950 (Act 136) enacts as follows:

> **79. 'Contract of guarantee', 'surety', 'principal debtor', and 'creditor'.**
>
> A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

And this meant that the guarantor's obligations are secondary to that of the borrower. The petitioner's purported recall of all the facilities was based on the letter dated 16 September 1997 issued by the petitioner to the borrower which purportedly reduced the overdraft facility and insisted that all the RM5 million must be fully repaid in three months. This was certainly in breach of the letter of offer. That letter of offer merely allowed for repayment on demand. It did not provide for a reduction of the facilities of overdraft by stages which was not only in breach of the contract but was actually unfair and oppressive bearing in mind that the term loan was only repayable in one lump sum on 8 April 1998. Such conduct by the petitioner was certainly against public policy.

By way of an analogy, reference should be made to the case of *Perwira Affin Bank Berhad v. Orison Sdn Bhd & 2 Ors* [2004] 5 CLJ 256. That was a case where a triable issue was raised where the defendant contended that the plaintiff's bank had charged interest twice by way of abnormal operations of the accounts. The defendant's counsel contended that such a practice must be considered contrary to public policy and the court said at p. 263 to p. 264 of the report:

> Thus, it is said that when the first defendant made drawings on the overdraft during this auto-debit phase of the sinking fund scheme, it would have effectively been paying interest twice. This practice, according to Mr K Shanmuga, must be considered contrary to the public policy. Is that really so? The answer to this question gives rise to a triable issue that needs to be ventilated by way of a trial. Of course, no judge would be willing to tolerate any contract that would be injurious to society. It is difficult to list down what would amount to an injury to society. It varies from case to case and from time to time and from country to country. Thus, the court would look askance at a contract 'to stipulate for iniquity' (*Collins v. Blantern* [1767] 2 Wils KB 341 at 350, per Wilmot LCJ) nor would a court enforce a contract that would be 'contrary to the general policy of the law' (*Lowe v. Peers* [1768] 4 Burr 2225 at 2233, per Aston J) or 'against the public good' as envisaged in *Collins v. Blantern, supra*.

Likewise here it would also be contrary to public policy for the petitioner to alter the basis of charging interest from BLR to COF before recalling the facilities in order to charge exorbitant interest.

[18] In regard to the term loan, the law provides that where a facility is granted for a fixed term, the bank cannot recall it before the expiration of the same and any clause requiring repayment on demand would not be valid. And any demand made before the expiry of the term of the facility would be considered as premature. In *Eushun Properties Sdn Bhd & Ors v. MBF Finance Bhd* [1992] 3 CLJ 1519; [1992] 1 CLJ 104, SC, Mohamed Yusoff SCJ speaking for the Supreme Court, in style, aptly said:

> It has also been alluded to us that this is a term loan for a specified period of three years and it would be premature for the plaintiff to recall the loan mid-term until the full loan has been disbursed.

Clause 8.01 of the agreement expressly stipulates that the 'tenure of the loan shall be for the maximum period of thirty-six (36) months from the date of the first disbursement of the loan ...'. To ensure that the first defendant (the borrower) shall fully utilise the loan, cl. 6.05 of the agreement states that 'The borrower shall pay a commitment fee of one percent (1%) per annum on the undrawn amount of the loan to the lender and such commitment fee shall be paid quarterly in arrears until the loan is fully disbursed.' The importance of this point becomes apparent when one considers the following decision in *Titford Property Co Ltd v. Cannon Street Acceptance Ltd* (1975) Creswel Encyclopaedia of Banking Law pp 71-72.

In an unreported decision of Goff J in *Titford Property Co Ltd v. Cannon Street Acceptance Ltd* on 22 May 1975, the defendant bank had granted term loan facilities to the plaintiffs. The letter granting the facility to the plaintiffs, stated that:

> We have pleasure in advising you of the terms and conditions upon which we are prepared to provide an overdraft facility in the maximum sum of Sterling pounds 245,000 for a period of 12 months to assist you in the purchase and development of the undermentioned freehold premises.

However, in each facility letter issued by the defendant bank to the plaintiffs, certain specific conditions of the loan were spelt out, amongst which was cl. 9, which stipulated that: 'All moneys due by you, whether by way of capital or interest, shall be payable on demand and you shall have the right to repay all moneys due without notice.'

In the face of this apparent contradiction in terms of the loan facility, Goff J said:

> It seems to me, where a bank allows an overdraft for a fixed time for a specific purpose – whether the time be such as the parties think is required for the achievement of the purpose, or only the most the bank will allow, that time is binding on the bank; otherwise the customer might well be led into a disastrous position, as has happened here. The customer, on the faith of the bank's promise to a loan, an overdraft for a fixed term, commits himself and then finds the overdraft cut off, so that he cannot meet his liabilities, and in addition he had incurred indebtedness to the bank in respect of abortive expenditure.

Holding that cl. 9 was repugnant to the whole facility granted by the defendant bank, Goff J continued:

> [The bank] could not, in my judgment, with one hand grant a facility for a term for a purpose which to its knowledge clearly involves the plaintiffs in incurring expenditure and liabilities, with a view to ultimate profit, and with the other take it away by an unqualified right to require repayment on demand at any time. In my judgment, therefore, I must modify cl 9, by reading it as subject to the provision as to the duration of this facility, or ignore it altogether.

Goff J's decision in *Titford Property Co Ltd v. Cannon Street Acceptance Ltd* was considered by Gibson J in *Williams & Glyn's Bank Ltd v. Barnes* (1980) *Creswell Encyclopaedia of Banking Law* pp 72-73; [1981] Com LR 205 in the following terms:

> It is clear to me that Goff J decided that the true purpose of the agreement contained in the facility letter was to provide money to be laid out in a development project with a view to profit. A provision for repayment on demand was, he concluded, repugnant to the main purpose ...

Gibson J did not specifically disagree with Goff J's decision in deciding the matter before him on the principle of repugnancy but said that he would prefer to decide the main object and intention of the transaction on point of construction of contract.

In view of the fact that the facility granted by the respondent to the first appellant in this present appeal is a term loan for three years, we are of the opinion that an issue of law has also been raised for determination of the court as to whether the demand for immediate repayment made by the respondent on 22 May 1986 was repugnant to the main purpose of the facility of the loan.

Here, the petitioner converted a substantial portion of the overdraft facilities (RM15,000,000 out of RM20,000,000) to a term loan repayable by way of a lump sum on or before 8 April 1998. Surely the respondent as the guarantor has a legitimate expectation that such terms stipulated by the petitioner must be adhered to (*Prismanet (M) Sdn Bhd (formerly known as Syarikat Telefon Wireless (M) Sdn Bhd) & Anor v. Perwira Affin Merchant Bank Berhad (formerly known as Permata Merchant Bank Berhad) & 3 Ors* [1998] 4 AMR 3588, 3598 to 3599). Both the purported letter of demand dated 26 January 1998 and the s. 218 notice

dated 17 February 1998 were not only premature but it was also an improper and an invalid demand being excessive in nature. The petitioner was demanding from the respondent as the guarantor for the payment of the sum of RM15,000,000 with the purported interest even before there was a default by the borrower and before such sums were due from the borrower. For these reasons, there was thus a serious dispute as to the purported liability of the respondent pursuant to the corporate guarantee. In the absence of a proper and valid demand the petitioner's whole claim against the respondent as a guarantor would be invalid, null and void. To say the least, the petitioner's claim was in breach of the letter of offer and premature, consequently, it must be held that the petitioner has no right to make any demand against the respondent as a guarantor.

[19] Furthermore, the petitioner was also estopped from proceeding with the winding-up proceedings because the letter of offer contemplated legal proceedings to recover any monies due and not by way of winding-up proceedings. That letter of offer dated 8 April 1997, *inter alia*, was worded as follows:

> Although we do not foresee the need, in the event of litigation, the bank shall charge interest at the prescribed rate determined by the bank on the amount outstanding at its absolute discretion and such interest rates shall be applicable before and after judgment date until full settlement.

Even the first purported letter of demand issued by the petitioner dated 26 January 1998 threatened to "proceed with further legal action against you to recover the sum due" and, obviously, this meant that the winding-up proceedings was not meant to obtain judgment and recover the sum due because the prayer was for the company to be wound up and not for the respondent to pay the petitioner any monies. It was certainly unjust for the petitioner to proceed by way of winding-up since there was a legitimate expectation that the petitioner would not do so and, consequently, the petitioner was estopped from proceeding by way of a winding-up action against the respondent (*Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, FC).

[20] Going on an uphill task, the petitioner argued that this court has no power to strike out a petition that has been filed pursuant to s. 218 of the Companies Act 1965 (Act 125). Plainly this was an argument devoid of any merits. It was raised for the very first

time and it constituted a technical objection which should have been couched as a preliminary objection. This particular objection was raised by the petitioner as an afterthought and it has been waived by the petitioner for the following reasons:

(1) no prior notice, at all, have been given by the petitioner in respect of their objection although there was more than ample opportunity to do so bearing in mind that the respondent's application in encl. 5 was filed since 30 April 1998 and the same enclosure came up for hearing before this court on many occasions; and

(2) the petitioner failed to reserve its right to raise this technical objection in any of its affidavits and there was also no mention of such an objection taken in its affidavits.

In *Bukit Melita Sdn Bhd v. Lam Geok Hee & 7 Ors* [1996] 1 LNS 479, although oral notice appears to have been given in respect of the preliminary objection raised yet the court held that this was insufficient and that written notice was required. In the present case before me, a *fortiori*, neither oral nor written notice has been given. The plaintiff ought to be aware of the requirement of four (4) working days' notice in respect of such an objection, if taken. And that requirement has been set out in the Bar Council's Ruling Number 03/2001 which states as follows:

BCR 03/2001: Notice of Preliminary Objections [w.e.f. 1/11/2001]

An advocate & solicitor shall give written notice, whether by letter, facsimile message or otherwise, to the advocates and solicitors representing all the other parties in the litigation, of his intention to raise a preliminary objection during the hearing of any matter before any court, tribunal or other body authorised to conduct hearings.

Such written notice shall be delivered or given to the other advocate(s) and solicitor(s) within a reasonable period before the hearing and not later than four (4) working days before the hearing.

Such written notice shall set out in sufficient detail:

(a) the nature of the proposed preliminary objection;

(b) a list of authorities that counsel raising the preliminary objection intends to rely on; and

(c) the proposed relief that counsel raising the preliminary objection will seek before the court, tribunal or body in the event that the objection is upheld.

Only in exceptional circumstances may counsel raise a preliminary objection during the hearing of any matter before a court, tribunal or other body authorised to conduct hearings without having given written notice in the manner prescribed in paragraphs (a) to (c) above. In such event, counsel representing the other parties in the matter shall have an automatic right to seek an adjournment of the hearing of the preliminary objection; and counsel raising the preliminary objection is precluded from objecting to such a request for an adjournment (if it is made) and from asking for costs for the adjournment.

Nothing in this Rule shall affect the general discretion of the court, tribunal or other body authorised to conduct hearings to deal with such matters, including the making of orders on costs.

This rule supersedes and replaces Ruling (H)19 of the Bar Council Rulings 1997, with effect from 1/11/2001.

In addition to that, the following two authorities would show that the filing of an affidavit in reply without reserving the rights to raise such objections would be taken against the party intending to raise the objections. The first authority would be the case of *Public Bank Berhad v. Berjaya Housing Development Sdn Bhd. & Ors.* [1995] 1 CLJ 237. The second authority would be that of *Gentali (Malaysia) Sdn. Bhd. v. Kawasaki Sunrock Sdn. Bhd.* [1996] 4 CLJ 813. It was part and parcel of my judgment that the petitioner has waived its preliminary issue belatedly which was, in the first place, improperly raised by it.

[21] Next, in the alternative, it was rightly argued that O. 18 r. 19 of the RHC applied to a winding-up action. In *NKM Development Sdn. Bhd. v. Irex Sdn. Bhd. (supra)*, the court there struck out and dismissed with costs the petition there pursuant to an application made under O. 18 r. 19 of the RHC. And this was what VC George J (as he then was) said:

6. The Company invoking Order 18 rule 19 of the Rules of the High Court and the inherent jurisdiction of the Court, took out a motion to have the petition struck off or dismissed. An early date of the hearing of the motion was sought for and obtained. It was fixed for hearing on the 31st December 1984.

A 7. Encik George Proctor on behalf of the petitioners had argued that the issue of whether the petition should be dismissed should only be considered at the actual hearing of the petition. Encik T. Thomas disagreed as I also did. Order 18 rule 19(3) explicitly provides that the jurisdiction given by Order 18 rule 19(1) applies to a petition as if the petition is a pleading. Applications to strike B out pleadings (and a *fortiori* petitions), should be made promptly. See 1982 White Book 18/19/2 and *Re St. Piran Ltd*. [1981] 3 All ER 270 at 273b.

In *Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd* [1989] 2 MLJ 423, C 425, LC Vohrah J (as he then was) aptly said:

Order 18 r. 19(3) specifically provides that the rule applies to a petition which must include a winding-up petition (see *NKM Development Sdn Bhd v. Irex Sdn Bhd* [1988] 1 CLJ 65 at p 66). I did not see the relevance of s. 221 as what was seised of by D the court on the day of the hearing was not the winding-up petition but the application to strike out the petition under O. 18 r. 19. I was satisfied that the application was properly before me and I was also satisfied on the evidence presented that there was a *bona fide* dispute as to the amount that was owing to the E petitioner.

In *Si & Si Sdn Bhd v. Hazrabina Sdn Bhd* [1996] 3 CLJ 657, the High Court found that the presentation of the winding-up petition by the petitioner was an abuse of the process of the court under O. 18 r. 19(1)(d) of the RHC. The High Court also went on to F order, *inter alia*, that the winding-up petition be struck out and that damages be paid to the respondent to be assessed by the senior assistant registrar. The appellant appealed and the Supreme Court held that (see pp. 662-663 of the report):

G Although the learned judge did not give his reasons for the conclusion, nevertheless, we agree with him for the following reason. It is patently clear that P's petition was made under s. 218 Companies Act 1948. The court's powers on hearing the petition is governed by s. 221, which after hearing the parties, H may dismiss it with or without costs, or adjourn it conditionally or unconditionally or may make an interim or other order that it thinks fit. There is therefore no provision in the section for the court when dismissing the petition to award damages to D, although an affidavit in opposition to the petition may pray for damages. It can only dismiss the petition with or without costs.

I

> On the other hand, in the present case, the learned judge, after having found that the presentation of the winding-up petition by the petitioner as an abuse of the process of the court under O. 18 r. 19(1)(d), ordered, in addition to giving costs, that the petitioner do pay damages to the respondent to be assessed by the senior assistant registrar. In our view, it is not within the contemplation of O. 18 r. 19(1) of the RHC to grant damages to the successful applicant, in addition to its powers under the Rule or under its inherent jurisdiction. Clearly, the policy of O. 18 r. 19 RHC is to prevent the improper use of the court's machinery, and therefore in a proper case, it will summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see 1 *The Supreme Court Practice 1995* para 18/19/33 'Abuse of the Process of the Court').

Finally, at p. 664 of the report, the Supreme Court rounded up the matter in these words:

> In the circumstances of the case, and for the above reasons, we are of the opinion that the learned judge was wrong, upon striking out the appellant's petition for winding-up of the respondent as being an abuse of process, to grant damages to the respondent. There has to be a separate action for damages.

Clearly, from the judgment, the Supreme Court acknowledged that O. 18 r. 19 of the RHC was applicable to a winding-up petition commenced pursuant to s. 218 of the Companies Act 1965 save that damages cannot be awarded pursuant to the said O. 18 r. 19 of the RHC. And in *Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd (supra)*, the winding-up petition was struck out by the court pursuant to O. 18 r. 19 of the RHC.

[22] Even if O. 18 r. 19 of the RHC do not apply in an application to strike out the winding-up petition as argued by the petitioner, this court being a Court of Law has the inherent jurisdiction to strike out the winding-up petition. Of pertinence would be this. That cases like *Chong Chee Yan v. Golden Dragon Garden Sdn Bhd (supra);* and *Re Lo Siong Fong* [1994] 2 MLJ 72 held that although O. 18 r. 19 of the RHC do not apply in an application to strike out the winding-up petition yet it also held that the court has the inherent jurisdiction to do so. It was conceded by the learned counsel for the petitioner that the case of *Dato' Ibrahim bin Hj Ismail & Anor v. Onstream Marine Sdn Bhd & Ors* [1998] 4 MLJ 86 sets out the principle that the court has the inherent jurisdiction to strike out the winding-up petition. While the petitioner relied on *Chong Chee Yan v. Golden Dragon*

Sdn Bhd (supra) and *Dato' Ibrahim bin Hj Ismail & Anor v Onstream Marine Sdn Bhd & Ors (supra)* to argue that O. 18 r. 19 of the RHC do not apply in an application to strike out the winding-up petition, yet the petitioner disagreed with the principle of law as set out in the same cases which stated that the court has the inherent jurisdiction to strike out the winding-up petition. With respect, the petitioner was not entitled to approbate and reprobate or "blow hot and cold" in such a manner. In *Yamamori (Hong Kong) Ltd v. Davidson & Ors* [1992] 2 MLJ 410, 418, Ian HC Chin JC (now judge) had this to say:

> As this point was canvassed by the plaintiff before the court at the trial of the 'preliminary objections' on 7 and 9 November 1989, which is that this is a case suitable for joinder, the following maxim of law applies – *Allegans contraria non est audiendus* – 'He is not to be heard who alleges things contradictory to each other'. See *Broom's Legal Maxims* (1st Ed) at p 103 where it is stated thus:
>
> > This elementary rule of logic, which is frequently applied in our courts of justice, will receive occasional illustration in the course of this work. We may for the present observe that it expresses, in other language, the trite saying of Lord Kenyon, that a man shall not be permitted to 'blow hot and cold' with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest'.

In other words, the petitioner cannot accept and reject or approbate and reprobate the principles of law set out in those two cases at the same time. The petitioner must accept those two cases as they were. I too had an opportunity to deliberate on the same subject matter in the case of *Teo Kim Huatt v. AETNA Universal Insurance Bhd (No: 1)* [2002] 2 CLJ 147. This was what I said:

> In this exercise, I am only concerned with estoppel in pais which arises from the conduct of the learned counsel for the defendant who blew 'hot and cold' in regard to the holding over. It is often said that a person should not approbate and reprobate (*Lissenden v. CAV Bosch Ltd* [1940] AC 412 at pp 417-418, [1940] 1 All ER 425 at p 429). It simply means that when a person has a choice between two courses of conduct and he picks and elects one choice of conduct, he cannot later resile from it. Here, the learned counsel for the defendant agreed to the holding over in order to file an affidavit in reply and he has benefited from that

course of conduct and subsequently he cannot resile from it. By resiling, his subsequent conduct was in fact inconsistent with his earlier conduct. In short, he cannot approbate and reprobate (*Banque Des Marchands De Moscou (Koupetschesky) (In liquidation) v. Kindersley & Anor* [1951] 1 Ch 112 at pp 119-120, [1950] 2 All ER 549 at p 552, where his Lordship Sir Raymond Evershed MR cited with approval the following cases:

(a) *Smith v. Baker* [1873] LR 8 CP 350;

(b) *Ex p Robertson, Re Morton* [1875] LR 20 Eq 733;

(c) *Evans v. Bartlam* [1937] AC 473 at p 479, [1937] 2 All ER 646 at p 649 (HL)).

But alas, in the context of *Cheah Cheng Lan*, all these legal niceties would come to nought.

[23] Next, in arguing that O. 1 r. 2(2) of the RHC applies to exclude O. 18 r. 19 of the RHC, the petitioner failed to take into account the following factors:

(a) that the Companies (Winding-Up) Rules 1972 do not state that the provisions of the RHC are not applicable;

(b) that O. 18 r. 19(3) of the RHC states that: "This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading";

(c) that O. 1 r. 2(3) of the RHC provides that:

> (3) In the case of the proceedings for which rules have been made, nothing in paragraph (2) shall be taken as affecting any provision of any rules (whether made under the Act or any other written law) by virtue of which the Rules of the High Court 1980 or any provisions thereof are applied in relation to any of those proceedings.

and the words "any rules" appearing therein must include the rules in the RHC and this has been decided by the Supreme Court in the case of *Dato' Mohamed Hashim Shamsuddin v. Attorney-General, Hongkong* [1986] 2 MLJ 112, SC, where Abdoolcader SCJ writing a separate judgment said at p. 122 of the report:

A It is now however necessary to turn to a consideration of the provisions of Order 1 rule 2(2) and (3) of the RHC. Rule 2(1) provides that subject to paragraphs (2) and (3) the RHC shall have effect in relation to all proceedings in the High Court but paragraph (2) enacts *inter alia* that they shall not have effect in relation to any criminal proceedings. B Paragraph (3) however stipulates that nothing in paragraph (2) shall be taken as affecting any provision of any rules (whether made under the 1964 Act or any other written law) by virtue of which the RHC or any provisions thereof are applied in relation to any of those proceedings. Mr. C Sethu contends that paragraph (3) of rule 2 cannot pertain to the provisions of Order 66 as that paragraph contemplates legislation outside the RHC. I think this contention is a fallacy as the reference to 'any rules' before the parenthesis in that paragraph must *ex necessitate rei* include the RHC themselves as well, since any other D construction would emasculate and indeed negate the validity of vital portions of the RHC as, for example, Order 52 which provides for committal for contempt and specifically relates and refers to criminal proceedings and Order 54 in relation to applications for the writ of *habeas* E *corpus*. When I put this to Mr. Sethu he was hard put to give any effective answer. I would emphasise that Order 1 rule 2(3) in specifically providing an exception to the provisions of paragraph (2) of that rule categorically permits the application of the RHC or any provisions thereof in relation to the proceedings specified in paragraph (2) of rule F 2.

(d) that the RHC has statutory force and is the written law of the country (*Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] 2 MLJ 143).

G

Next, it was argued by the petitioner that O. 18 r. 19 of the RHC and the inherent jurisdiction of the High Court has no application to winding-up proceedings and the petitioner relied upon the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd & Anor v.* H *Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248. Excerpts from the decision of Abdul Hamid Mohamad JCA's (now FCJ) judgment in that case were referred and there his Lordship opined that there was no necessity for provisions of judgment in default, summary judgment or striking out the pleadings in relation I to matters under the Companies (Winding-Up) Rules 1972. His Lordship Abdul Hamid Mohamad JCA (now FCJ) further stated that one of the most abused procedure adopted in winding-up

proceedings was the application to strike out the petition under O. 18 r. 19 of the RHC and/or the inherent jurisdiction of the court. In fact, the excerpts of Abdul Hamid Mohamad JCA's (now FCJ) judgment in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals (supra)* was taken from the learned judge's own judgment in the case of *Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Trading Sdn Bhd* [1999] 4 CLJ 135. I have read, again and again, the judgment of Abdul Hamid Mohamad JCA (now FCJ) in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals (supra)* and I have arrived at the conclusion that the excerpts of his Lordship's speech did not rule nor go so far as to hold that O. 18 r. 19 of the RHC or the inherent powers of the court was not applicable at all to a winding-up petition. His Lordship too did not rule that every application to strike out the winding-up petition pursuant to O. 18 r. 19 of the RHC on the inherent powers of the court was an abuse of process. Ultimately, each case must surely depend on its own facts and circumstances. To understand further the judgment of Abdul Hamid Mohamad JCA (now FCJ) in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other appeals (supra)*, I must now reproduce the relevant passages of his Lordship's judgment (see p. 267 of the report):

> One of the most abused procedure adopted in winding-up proceedings is the application to strike out the petition under O. 18 r. 19 of the RHC 1980 and/or the inherent jurisdiction of the court.
>
> In *Buildcon-Cimaco Concrete Sdn. Berhad* [1999] 4 CLJ 135 1 pointed out the undesirability of applying such procedure to a winding-up petition:
>
> > Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s. 218 winding-up petition which is more simplified and geared for speedy disposal. RHC 1980, for example, provides for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O. 14), striking out of pleadings (O. 18 r. 19), summons for directions and setting down for trial. Hearing date is only given after the directions made in the summons for directions are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a

writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear-cut cases.

The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg, service, advertisement, compliance with r. 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage. In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.

Furthermore, more often than not, resort to O. 18 r. 19 of RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time.

In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

And at p. 269 of the report, his Lordship concluded the matter in these words:

Having written on it four times and in two languages, it is timely that my learned brother Gopal Sri Ram JCA and this court come out strongly against such practice, which, at the very least is delaying the hearing and disposal of winding-up petitions, which is unfair to the petitioners and clogging the court docket.

Gopal Sri Ram JCA writing a separate judgment in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals (supra)* expressed and shared the same views as that held by Abdul Hamid Mohamad JCA (now FCJ).

[24] In *Tan Kim Hor & Ors v. Tan Heng Chew & Ors* [2003] 1 MLJ 492, the Court of Appeal considered *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals (supra)* and *Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Trading Sdn Bhd (supra)* and held that it did not mean that O. 18 r. 19 of the RHC was totally inapplicable and that there may be instances where a winding-up petition ought to be struck out pursuant to O. 18 r. 19 of the RHC.

The sum total of it all would be this:

(1) that the winding-up proceedings herein constituted an abuse of process and ought to be struck out;

(2) that there were serious disputes raised by the respondent in relation to the whole of the petitioner's claim; and

(3) that the alleged debt was *bona fide* disputed on substantive grounds.

Conclusion

[25] For the reasons as adumbrated above, I gave those orders which I had stated earlier.